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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

E.W. SCRIPPS COMPANY, THE KENTUCKY POST and AL SALVATO,

Petitioners,

v.

LOUIS A. BALL,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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* Petitioner the E.W. Scipps Co. has no parent companies or partially-owned subsidiaries. Petitioner *The Kentucky Post* is published by Scipps Howard, Inc., a wholly-owned subsidiary of the E.W. Scripps Co.

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I.

Respondent's expansive liberties with the record below necessitate a brief reply.

First and foremost is the over-arching premise of Respondent's brief that this case involves accusations of reputation-crushing magnitude. *See, e.g.*, Respondent's Opposition to Petition for Writ of Certiorari at page 25 ("Opp. at ___ "), *quoting Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring) ("Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers"). No such accusations were made. No lives were destroyed, no ca-

reers ruined. Since the publication of Petitioners' autumn 1984 evaluation of Respondent's public performance ("the series"), Respondent has *twice* been reelected to his position as Commonwealth's Attorney, both times without opposition.

The *worst* Respondent can say about the series is (1) that it somehow "imput[ed]" to him "unethical dilatoriness," (2) that its "theme" was that Respondent "was an incompetent official," and (3) that it included the hyperbolic rhetoric of a disenchanted ex-policeman, who said that criminals in Ball's jurisdiction "couldn't have a better friend." *See* Opp. at 20, 27 and 14, respectively. The publication of such "facts" and opinions does not show, as Respondent grandiloquently suggests, that Petitioners "embarked on [a] shameful and malicious attack simply to 'get' [Respondent], letting the devil take the hindmost." Opp. at 27. Nor, Respondent's bombast to the contrary, do such "facts" and opinions amount to the sort of scurrilous attack typical of the libel cases that have been heard by this Court. For the history of constitutional jurisprudence consists almost exclusively of libel cases where the plaintiff's reputation was damaged by accusations of crime or other highly defamatory conduct. *See, e.g., Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990) (high school wrestling coach accused of lying under oath); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (candidate for judgeship accused of bribery and blackmail); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (attorney representing family of murder victim accused of participating in a "frame-up" of the murderer, of being part of a communist conspiracy to discredit police officers, and of having a lengthy crim-

inal record); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971) (mayor and candidate for office of county tax assessor accused of having been charged with perjury in a federal court); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (athletic director for the University of Georgia accused of fixing a football game between Georgia and the University of Alabama).

Nothing in the series accuses Respondent of illegal activities, malfeasance, or of any wrongdoing whatsoever. Indeed, at most, the series says neither more nor less than what many citizens of Campbell County had believed for years: that Respondent's performance as Commonwealth's Attorney had been uninspired and lackluster. *See* Petition for Writ of Certiorari at 31a - 59a ("Pet. at ___ ").

II.

Respondent mischaracterizes the required use of special interrogatories as a "novel, if not radical" proposal. Yet Kentucky (like many other states) already has mandated the use of special interrogatories in certain types of cases. *See, e.g., Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984) (requiring special interrogatories in cases governed by the comparative negligence rule). Additionally, the benefits of special interrogatories have been explained by the Kentucky Supreme Court, most recently in the case curiously cited by Respondent to support his argument that their mandatory use would bring about a "radical transformation in Kentucky law":

> Since rendition of our decision in *Baxter v. Tankersley*, [416 S.W.2d 737 (1967)], this court has abandoned contributory negligence

> as a complete bar to recovery and adopted in its place certain provisions of the Uniform Comparative Fault Act. *We have directed submission of special interrogatories to the jury* to ascertain its *precise findings* as to total damages due plaintiff without regard to his fault, and the percentages of total fault attributable to plaintiff and defendant. [Citation omitted]. The use of special interrogatories has been encouraged in negligence cases involving multiple parties. [Citation omitted]. Under present law, the decision-making required of a jury (*eight separate findings in this case*) is considerably more complex than it was under former law. . . . We now require specific findings on a number of issues . . . .

Young v. J.B. Hunt Transportation, Inc., 781 S.W.2d 503, 504-05 (Ky. 1989) (emphasis added). *Compare* Pet. at 16-18. The use of special interrogatories, in fact, conforms with Kentucky's "traditional posture as to use of 'bare bones' instructions . . . . " Opp. at 3 *quoting Young*, 781 S.W.2d at 506. This is because, as the *Young* court made clear, "To attempt by instructions to fine-tune the deliberations of the jury would necessarily result in confusion, coercion of reluctant jurors and permit strong-willed jurors to exercise undue influence upon the proceedings." 781 S.W.2d at 505. *See* Pet. at 15 n.14.

Respondent's own brief demonstrates why special interrogatories should be constitutionally required in public official libel trials. For example, in his Opposition, Respondent continues to excoriate Petitioners for what he characterizes as the "Cinema X Libel."

See Opp. at 24-25. But in its opinion, the Kentucky Supreme Court held that Petitioners' comments about Respondent's handling of the investigation into that pornographic theatre were "derogatory, *but hardly defamatory*." *Ball v. Kentucky Post*, 801 S.W.2d 684, 686 (Ky. 1990) (emphasis added). Neither Petitioners nor Respondent (nor, indeed, the Kentucky Supreme Court itself) have any way of knowing whether the jury rendered its verdict in favor of Respondent on the basis of this *non-defamatory* article or not. As a result, neither Petitioners nor Respondent (nor the Kentucky Supreme Court) have any discernible way of knowing whether the jury rendered its verdict on permissible or impermissible grounds. The use of special interrogatories, of course, would have rendered this question moot.

Yet despite the court's ruling, Respondent continues to claim that a description of his less than spectacular handling of this matter—a description which was based on several interviews with reputable sources—"constitutes, at worst, a sheer fabrication, or at best reckless disregard of falsity." Opp. at 25. So, here we have a Respondent who would rail against, and base his argument on, a part of the series that the Kentucky Supreme Court found not to be defamatory.

Likewise, an entire heading in Respondent's brief is devoted to assuring this Court that the decision of the Kentucky Supreme Court below was sound when it was based on the statement that: " 'HE TURNS THEM RIGHT BACK, AND THEY COMMIT CRIME AFTER CRIME. THEY COULDN'T HAVE A BETTER FRIEND.' " Opp. at 14. (Capitalization supplied). Nothing could be clearer from this Court's

ruling in *Milkovich* than that such statements of indisputably pure rhetoric are constitionally nonactionable. *Milkovich*, 110 S. Ct. at 2704-05 *citing Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970). Yet, without benefit of special interrogatories, no one can know whether the jury below impermissibly awarded damages to Respondent on the basis of this hyperbole.

CONCLUSION

At bottom, Respondent's Opposition, like the Kentucky Supreme Court's opinion, seeks to blur the record and distract this Court's attention away from the stark reality that a state has imposed damages on a newspaper for evaluating the performance of a public official and has done so without evidence of substantial falsity linked to knowledge of that falsity linked to damages arising from it. As a result, the Kentucky Supreme Court's decision should be reversed.

Respectfully submitted,

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